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source and exclude any others. Section 253(a) is violated not by the addition of ICS/S&W, but by the exclusion of any others, which gives to ICS/S&W a competitive advantage forbidden by Section 253(a). Section 253(a) prohibits such advantages for one competitor without regard to the pre-existing level of competition.

The Exclusive Use Arrangement will certainly restrict the ability of many entities to use their own facilities to serve customers located in communities that are along (and beyond) the freeway corridors. Specifically, the Exclusive Use Arrangement will require competitors that want to use the most direct, shortest routes between these communities to use the facilities provided by ICS/S&W, whether for local or long distance services.

The FCC has held that restrictions on the choice of facilities used to provide competing telecommunications services have the "effect of prohibiting" the ability to provide those services. The FCC said in part:

[W]e find that Section 253(a) bars state and local requirements that restrict the means or facilities through which a party is permitted to provide service, i.e., new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options.

Texas, ¶ 74. The FCC further held that:

[S]ection 253(a) of the Act bars state or local governments from restricting the means by which a new entrant chooses to provide telecommunications services. Specifically, we determined that the 1996 Act requires that new entrants be permitted to offer services via resale, incumbent LEC unbundled network elements, the new entrant's own facilities, or any combination thereof.

Id. at ¶ 128. Surely, Section 253(a) also bars restrictions that coerce the use of another providers facilities. Further, as discussed below, the FCC has also found that Section 253(a) bars requirements that are far short of absolute requirements or prohibitions.

b. Requirements that increase the costs of some competitors are barred by Section 253(a).

Your letter notes that the Exclusive Use Arrangement does not prevent a competitor from building its own network outside the state freeway right-of-way. While this is certainly true, it is also clear that competitors installing outside those corridors will incur additional costs as compared to ICS/S&W. The FCC has clearly stated that legal requirements that impose added

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costs or investment requirements on some competitors, but not others, are barred by Section 253(a). The FCC said in part:

We find that requiring payphone providers to provide local exchange services in order to be eligible to offer payphone services significantly hinders such providers relative to incumbent LECs and certified LECs. Such a requirement substantially raises the costs and other burdens of providing payphone services, thus deterring the entry of potential competitors.

New England ¶ 20. The FCC has very recently confirmed that imposing added investment requirements can have the effect of prohibiting competitors, saying in part:

We preempt enforcement of these requirements . . . independently, because they impose a financial burden that has the effect of prohibiting certain entities from providing telecommunications services in violation of section 253.

Texas ¶ 13. The FCC continued:

[W]e further find, as an independent basis for preemption under section 253, that enforcement of the build-out requirements would “have the effect of prohibiting” AT&T, MCI and Sprint from providing service contrary to section 253(a) due to the substantial financial investment involved and the comparatively high cost per loop sold by a new entrant. Texas ¶ 78.

Clearly, the Exclusive Use Arrangement is not saved by the fact that other providers can use higher cost routes than Mn/DOT has made available to ICS/S&W.

c. The Exclusive Use Arrangement would inhibit the fair and balanced regulatory environment required by Section 253(a).

The Exclusive Use Arrangement is also barred by Section 253(a) because it leads to an unfair and unbalanced regulatory environment in which ICS/S&W has regulatory advantages (exclusive use) not available to other competitors. The FCC has stated:

The more difficult issue is whether, under section 253(a), the Ordinance “has the effect of prohibiting”, the ability of any entity to provide payphone service . . . In making this determination, we consider whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.

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Huntington Beach ¶ 31. The FCC has recently confirmed this criteria, saying:

In evaluating whether a state or local provision has the impermissible effect of prohibiting an entity's ability to provide any telecommunications service, we consider whether it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." (citing Huntington Beach)

TCI ¶ 98. This unbalanced legal and regulatory effect of the Exclusive Use Arrangement is also barred by Section 253(a).

4. **Providing Fiber Optic Transport Capacity To Other Carriers Is A "Telecommunications Service" Within The Meaning Of Section 253(a).**

Your letter states that ICS/S&W network will only be used to provide "wholesale" transport to other telecommunications service providers as a "carrier's carrier." That point does not prevent violation of Section 253(a), however, because services provided by one carrier to another are clearly included within the "telecommunication services" that are protected by Section 253(a).

Section 253 (a) is not limited to either retail or local telecommunications service. Rather, the broadest term, "telecommunications service," is used to define the scope of protected services.⁶ Services provided by one carrier to another are "telecommunications services" if those service are ultimately used by the public. For instance, "exchange access services"⁷ are offered by one carrier to another (by a local exchange carrier to an interexchange carrier) and are even characterized as a type of "carriers' carrier" service.⁸ Yet is clear that all such services are "telecommunications services" even though not provided directly to end users. It is also clear that interoffice transport services provided to IXC's, including DS1 and DS3 capacity, are also telecommunications services.⁹ Similarly, the interexchange capacity that would be offered under

⁶ Telecommunications service is defined in 47 USC § 153(51) as follows:

The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used."

⁷ Exchange access services are defined in 47 USC § 153(40) as follows:

The term 'exchange access' means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

⁸ See, e.g. 47 CFR § § 69.3(e)(3), 69.4(c), (e), and (h).

⁹ See, e.g. 47 CFR § § 69.111, 69.112, 69.123

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the Exclusive Use Arrangement is a "telecommunications service" because it too will be used by the public.

5. The 30 to 50 Year Duration of the Exclusive Use Arrangement Is a Prohibition Within the Scope of Section 253(a).

Mn/DOT proposes to negotiate an Exclusive Use Arrangement that may be as long as thirty (30) to fifty (50) years. Competitive restrictions of that duration are clearly prohibited by Subsection 253(a). As the FCC stated:

"Section 253(a) . . . does not exempt from its reach state created barriers to entry that are scheduled to expire several years in the future. In any event, a "temporary" ban on competition that lasts for a minimum of nine (9) years and a maximum of twelve (12) years from the date of enactment of the 1996 Act is, for all practical purposes, an absolute prohibition.

Silver Star ¶ 39. The proposed duration of the Exclusive Use Arrangement is within the scope of the bar imposed by Section 253(a).

B. The Exclusive Use Arrangement Does Not Serve Any Purpose Within the Scope of § 253(b) and Is Not Competitively Neutral.

The FCC has indicated that prohibitions that may violate Section 253(a) may be preserved if they meet the requirements of Subsections 253(b) or (c). A review of the Exclusive Use Arrangement shows that it does not qualify under Subsection 253(b).

1. Section 253(b) Does Not Authorize A Prohibition On Competition For One Telecommunications Service To Promote Competition For Another Service.

In your letter, you assert that competition in the local exchange market will not be adversely affected, and that it may even be enhanced because "... the agreement will require the developer to provide capacity to [local exchange] service providers based on uniform, non-discriminatory rates." To the contrary, as discussed above, providers of local services in communities along the freeway corridors will be impeded from using their own facilities. Further, even assuming that such a precompetitive effect on some local services could be demonstrated, there is nothing in the Act that suggests that a State can justify prohibiting

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competition for one telecommunications service by demonstrating a competitive benefit for another service.¹⁰

The justifications for such a prohibition are set forth in Subsections (b) and (c) and do not include offsetting competitive benefits for another service. Further, the fundamental rationale of the Act is to substitute competition for regulation to the extent possible. In contrast, the Exclusive Use Arrangement seems to increase, rather than reduce, the scope of the State's involvement in regulation of telecommunications services. Mn/DOT's efforts to mitigate the adverse effects of the Exclusive Use Arrangement by controlling rates charged to third parties and capacity made available is fundamentally inconsistent with goal and direction of the Act to replace regulation with competition in all markets.

2. **A Prohibition of Competition May Not Be Justified Under Section 253(b) By Cost Savings or Additional Capacity for a State or Local Authority.**

You assert several "significant gains to the public" from the Exclusive Use Arrangement, including additional capacity and cost savings to the State. As the RFP makes clear, these economic benefits will be obtained by "bartering" the exclusive use of the State's freeway right-of-way for free transmission capacity.

However, Section 253(b) does not include "cost savings" as among the public benefits that will justify a prohibition of competition. If cost savings justified requirements that had the effect of prohibiting competition, there would be no limit on what a State or local government could do if they merely saved costs along the way. Accordingly, the benefit of cost savings to the State does not qualify under Section 253(b).

¹⁰ As the FCC has noted:

As explained in the Local Competition First Report and Order, under the 1996 Act, the opening of the local exchange and exchange access markets to competition "is intended to pave the way for enhanced communication in all telecommunications, by allowing all providers to enter all markets."

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3. The Exclusive Access Agreement is Not “Necessary” to Achieve any of § 253(b)’s Public Purposes.

Section 253(b) requires that a prohibition be “necessary” to meet the legitimate objectives set forth in that Section. The FCC has recognized that “necessity” is a separate and additional criteria, saying:

Permissible state and local requirements under § 253(b) must also be necessary to achieve the public interest purposes listed in that section.”

Texas ¶ 83. The FCC has further stated:

As an independent basis for our decision that the DPUC Decision fails to satisfy section 253(b), we conclude that the DPUC has not demonstrated that its prohibition is “necessary” to “safeguard the rights of consumers” or to “protect the public safety or welfare.” As an initial matter, we reject the DPUC’s claim that its prohibition is defensible because it is a “reasonable exercise of its explicitly reserved authority.” An interpretation of section 253(b) that a state’s action merely be reasonable ignores the specific language of the statute retiring such state action to be “necessary.” Moreover, accepting the DPUC’s claim would, in effect, require us to employ a relaxed interpretation of the term “necessary” that is inconsistent with Congress’s purpose of removing regulatory barriers to entry in the provision of telecommunications services.

New England ¶ 21.

A prohibitive legal requirement is not “necessary” if there are other less restrictive methods of serving that same public interest. The FCC further said in part:

‘The DPUC has chosen the most restrictive means available in its efforts to protect payphone customers -- a flat prohibition against non-LECs providing payphone services within the state. The record, however, does not support a finding that such an extreme approach is “necessary” to protect payphone customers. The DPUC has not demonstrated that other methods short of a flat prohibition are insufficient to protect payphone customers.

Id. ¶ 22. There is no indication that a less restrictive approach to control of right of way use could not be applied to achieve all valid purposes of the State. Accordingly, the Exclusive Use Arrangement also fails to meet the criteria that the restriction be “necessary.”

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4. The Exclusive Use Arrangement is not competitively neutral.

Even if Mn/DOT's purposes were within the scope of Sections 253(b), implementation must be "competitively neutral." In deciding to preempt a state build-out requirement because of its prohibitive effect on telecommunication service providers, the FCC explained:

The Texas commission's assertions that these [build-out] requirements advanced the public interest goals enumerated in section 253(b) ignores the statutory mandate that the means chosen to further these goals must be competitively neutral. Texas ¶42.

(Emphasis added.) The FCC also found that enforcement of Texas' continuous property restrictions relating to the build-out requirements would not be preserved under section 253(b) because such enforcement of these restrictions would not be "competitively neutral."

Limiting resale of SWBT center service to a continuous property area has a disparate impact on the ability of new entrants to compete in the provision of centrex services Consequently, we find that enforcement of the continuous property restrictions is not "competitively neutral" and thus not permissible under section 253(b). Id. at ¶221.

(Emphasis added.) The Exclusive Use Arrangement is inherently incapable of being applied in a competitively neutral manner. It will obviously have a "disparate impact" on the ability of competitors. The express purpose and effect of the Exclusive Use Arrangement is to foreclose all other service providers from use of the freeway right-of-way. By conferring this obvious competitive advantage on ICS/S&W, the Exclusive Use Arrangement necessarily puts other potential service providers at a competitive disadvantage.

C. The Exclusive Use Arrangement Exceeds the Scope of Right-Of-Way Authority Reserved To States Under § 253(c) and Does Not Reflect Competitively Neutral Management or Compensation to the State.

Section 253(c) preserves the traditional authority of the state and local government to manage the public rights-of-way, reading in part:

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis

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However, Section 253(c) does not save the Exclusive Use Arrangement because it constitutes neither right of way management on a competitively neutral and nondiscriminatory nor compensation to the State on a competitively neutral and nondiscriminatory basis.

1. **The Mn/DOT Exclusive Use Arrangement Is Outside The Scope Of Right-Of-Way Management.**

The essence of the Exclusive Use Arrangement is the provision of free fiber optic capacity to the State in return for an exclusive right to use the right-of-way, a trading by the State of market power over third parties in return for monetary benefit of free capacity for itself. Mn/DOT proposes to control ICS/S&W's use of market power by contractually requiring that wholesale transport services be provided at universal, non-discriminatory rates presumably regulated by some State agency. Neither bargaining exclusive use for free capacity nor regulation of rates and capacity are within the scope of right of way management. The FCC has stated:

We recognize that § 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform a range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way. . . . These matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

TCI ¶103. Based on these standards, it seems impossible that the Exclusive Use Arrangement could be justified as traditional right-of-way management.

2. **The Exclusive Use Arrangement Also Fails the Requirement that the Restriction be Competitively Neutral and Nondiscriminatory.**

While the receipt of free fiber capacity for right-of-way use has some similarities to "compensation," under Section 253(c), any such compensation must be "fair and reasonable" and "competitively neutral and nondiscriminatory." An express grant of exclusive use to one competitor is as far removed from "competitive neutrality and nondiscrimination" as it is possible to get. While there may be legitimate reasons to deny use of freeway rights of way to

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anyone, once the State decides to allow use of the freeway by one competitor, all competitors must be treated in a competitively neutral and nondiscriminatory manner.

Your letter characterized the payments from third parties to ICS/S&W as “nondiscriminatory” payments under “Section 253(c).” That argument confuses the proper role of the State and telecommunications service providers. Section 253(c) does not empower the State to delegate its right to receive “reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis” to a single telecommunications provider (who would then receive compensation from other providers.) If that sort of arrangement meets the requirements of Section 253(c), then a city could grant an exclusive municipal franchise to a single LEC (or new CLEC) allowing exclusive use of public streets. The LEC (or CLEC) could be given an exclusive right to use the streets, subject only to the requirement that the LEC (or CLEC) lease capacity to other service providers at nondiscriminatory rates that would be reviewed by the city.

Clearly, such an arrangement can not stand under Section 253. Just as clearly, Mn/DOT can not grant an exclusive right to use the freeway rights of way and delegate the right to receive reasonable compensation.

D. Section 253(d) Requires the FCC to Preempt the Right-Of-Way Access Agreement’s Legal Requirement of Exclusivity.

Under § 253(d), if the FCC determines that a state or local government has enacted a statute, regulation or legal requirement that violates § 253(a) or (b), the FCC is required to preempt to the extent needed to correct the violation. Section 253(d) reads in part:

If . . . the [FCC] determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the [FCC] shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(Emphasis added.) This provision imposes on the FCC a non-discretionary duty to preempt local laws, regulations or legal requirements that have the prohibitive effects prescribed by § 253(a). As the FCC has noted:

“[S]ection 253 expressly empowers -- indeed, obligates -- the commission to remove any state or local legal mandate that ‘prohibit[s] or has the effect of prohibiting’ a firm from providing any interstate or intrastate telecommunication service.” Texas ¶9.

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Section 253(d) directs the FCC to limit the scope of its preemption to that which is "necessary to correct such violation or inconsistency." The exclusivity that is at the core of the Exclusive Use Arrangement must be preempted under this standard.

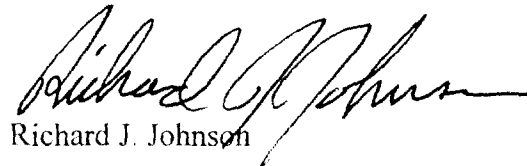
CONCLUSION

Mn/DOT's Exclusive Use Arrangement is a "legal requirement" that will prohibit, or have the effect of prohibiting all but one telecommunications service provider from use of the freeway right-of-way. The Exclusive Use Arrangement will impede other providers' ability to use their own facilities and will provide a prohibited advantage to ICS/S&W in providing carrier's carrier services along the freeway corridors. As a result, the Exclusive Use Arrangement will violate § 253(a). The Exclusive Use Arrangement does not satisfy the stringent criteria under § 253(b) or (c) that must be met in order to be preserved from preemption under Section 253(d).

While MTA does not wish to institute a complaint before the FCC, it will have no choice but to do so if the Exclusive Use Arrangement is part of the final contract between Mn/DOT and ICS/S&W. MTA has the right to obtain a copy of that contract, which is a public document, under Minn. Stat. Chpt. 13. MTA hereby requests that Mn/DOT provide a copy of that final contract, as provided in Minn. Stat. Section 13.03.

In the meantime, please feel free to contact me if you wish to discuss this matter further.

Very truly yours,



Richard J. Johnson

RJJ/jdh

cc: Susan Fox (Federal Communications Commission)

Michael J. Nowick

142733



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL
December 26, 1997

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

EXHIBIT

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Re: Minnesota Department of Transportation and Department of Administration
Agreement to Grant Exclusive Access to State Freeway Right-of-Way

Dear Mr. Johnson:

The purpose of this letter is to inform you of the State of Minnesota's Department of Transportation/Department of Administration's ("the State") response to your November 26, 1997 letter. The State executed a contract with ICS/UCN, LLC ("the Developer") and Stone & Webster on December 23, 1997.

Based on MTA's continuing objection to the grant of exclusive access to the freeway right-of-way, and their threatened litigation of this matter, the State believes it must seek a declaratory ruling from the Federal Communications Commission ("FCC"). We will be filing a Petition for Declaratory Relief within the next week. Because of this fact, I will not respond in detail to each of the arguments raised in your letter. However, the State is concerned that MTA has approached this issue with little respect for the State's right to manage freeway rights-of-way, and thus, wish to respond to several points raised.

A. Contract Terms.

Now that the contract negotiations are completed, it is important to correct certain assumptions you made regarding the Agreement. First, the term of exclusivity is ten years from date of acceptance, with a subsequent period of up to ten years, in which the Developer has a right of first negotiation. Second, along with the duty to sell or lease Developer's network capacity on a nondiscriminatory basis, Developer must also install and maintain collocated fiber of third parties, provided it is installed at the same time as Developer's network capacity. Installation and maintenance of collocated fiber must be done on a nondiscriminatory basis. As a result of the shortened period of exclusivity and the duty to collocate fiber, the capacity review provision referenced in my previous letter was no longer considered necessary.

B. Exclusive Access Will Not Have the Effect of Prohibiting Entities from Offering Telecommunications Services.

Your letter asserts that any exclusive access arrangement will substantially increase investments required to provide service to communities along the freeway corridors (by requiring indirect routing of facilities) or coerce entities who wish to avoid costs to use Developer's facilities. First, as the MTA is well aware, there is a market price for the lease of wholesale fiber transport in Minnesota. Current providers of this transport serve the needs of all current telecommunications service providers, routing traffic across the State. Developer will not enter the market by requiring traffic to be routed on its network as did MEANS, which is owned by approximately 61 incumbent local exchange companies, who are also members of the MTA. Rather, it must compete for traffic in a market which already has sufficient fiber capacity. To suggest that providers will be "coerced" to utilize Developer's network is absurd.

Second, the State disputes that the freeway right-of-way is the only economically viable right-of-way connecting Minnesota communities. Competition in the deployment of fiber has led different carriers to utilize multiple varying routes for purposes of installing their networks. Because State Trunk Highways generally run parallel to freeways throughout the State, no entity will be substantially burdened in developing alternative rights-of-way. In fact, half of Developer's network capacity will be installed on State Trunk Highway rights-of-way, which MTA members can utilize today or in the future. In addition, railroad, gas and oil pipelines and power line rights-of-way, provide alternatives for fiber placement throughout the State. Finally, to the extent that any provider wishes to construct collocated fiber, Developer is obligated to install and maintain fiber owned by third parties on the freeway rights-of-way. Thus, there is no basis to believe that entities availing themselves of these alternative rights-of-way or collocation opportunities will leave Developer with any, let alone a substantial, cost advantage.¹

¹ Your letter cites *New England and Texas* as standing for the principle that imposition of added costs on some competitors but not others, is barred by Section 253(a). In those cases, however, the FCC pre-empted economic entry regulation by state public utility commissions which favored parties for unsubstantiated regulatory reasons and where the cost differential was so substantial as to effectively prevent market entry. (See *Huntington Park*, where the Commission did not preempt a local restriction on rights-of-way absent a clear showing of a substantial cost differences which prevented market entry.) If rights-of-way were the key cost determinant in constructing a network, the party which paid the least for acquiring rights-of-way would be the only successful competitor. Yet the State is aware of at least seven fiber networks in Minnesota. MTA's bald assertion of higher costs without examining why a carrier such as AT&T, which acquired rights-of-way for much of its network, fifty plus years ago, is not the only fiber provider throughout the State, demonstrates MTA's desire to ignore the very real opportunities to place fiber throughout Minnesota in a cost-effective manner utilizing pre-existing rights-of-way

A third concern raised is that the Project adds one source of fiber capacity at the exclusion of any others. This would be true only if existing capacity and alternative rights-of-way did not exist or could not be expanded. MTA is knowledgeable about the existence of these alternatives and cannot seriously argue that they have no bearing on whether there is an effective prohibition against offering telecommunication services under Section 253(a).² Rather than examine the practical impact on competition as required by all of the FCC precedents cited in your letter, the MTA appears to argue that any exclusive agreement, regardless of its terms, is somehow a per se violation of Section 253(a). The State believes that FCC precedent would require a thorough showing that the requirement has a material, adverse "practical impact" on competition. *Huntington Park* at paras. 27 and 31. MTA's reliance on the general assertions of your November 26, 1997 letter is indicative of the fact that no such material adverse impact will occur.

C. The State's Agreement is Competitively Neutral and Nondiscriminatory.

The State does not believe that the issues related to Sections 253 (b) and (c) need to be addressed as there is no adverse material impact on the statewide market for fiber transport facilities which results from the Agreement. Nonetheless, the state requirement should not be preempted where the State's pre-existing powers to protect public safety and manage the rights-of-way are involved. Although not necessary for resolution of this matter, the State strongly disagrees with your conclusion that the Agreement is not saved by Sections 253(b) and (c).

Your letter raises the concern that there is no purpose served by the Project which is protected by Sections 253(b) and (c). The purpose for granting the exclusive use is not to barter rights-of-way but to protect the safety of the traveling public and of transportation workers and to avoid unnecessary disruption of freeway rights-of-way which results in significant public inconvenience and economic loss. These are the "purposes" that require the grant of exclusive access to the freeway rights-of-way to a single developer. The public benefits described are the

Furthermore, as described in more detail in Section C, when a cost differential results from the state's legitimate exercise of reserved rights pursuant to Section 253(b) and (c), a cost difference to the extent one even exists, is clearly not dispositive of the issue. Finally, any concerns regarding this issue are allayed as telecommunications firms will have the right to collocate facilities in the freeway rights-of-way pursuant to the Agreement.

² Unlike *In the Matter of the Public Utility Commission of Texas, et. al.*, CCB Pol. 96-13 et al., Memorandum Opinion and Order, FCC 97-346, released: October 1, 1997, no entity is required to build out facilities. Thus, entities are free to provide services by leasing facilities or self-provisioning their own facilities. There is no state requirement which restricts the means by which a new entrant chooses to provide telecommunications services.

result of making the right-of-way resource available for development. MTA seems to assert that states have no ability to expand the inventory of available rights-of-way to promote competition unless every last telecommunications carrier can, on its own, install facilities in that right-of-way. However, based on a decades long prohibition on longitudinal placement of utilities on freeway rights-of-way by the FHWA, the State is legitimately concerned that safety issues create the equivalent of a capacity constraint on these unique freeway rights-of-way which need to be accounted for when opening these rights-of-way.

Because the State reasonably found that a single point of contact and control was necessary to protect public safety and to prudently exercise its management of the rights-of way, it provided all parties with an opportunity to submit proposals pursuant to an open and fair RFP process. In fact, many of MTA's members, through their ownership in MEANS, submitted a proposal to the State for this exclusivity.

The RFP process assures that all competitors are treated fairly. MTA's view that an exclusive use arrangement is "inherently incapable" of being applied in a competitively neutral manner is another "per se" approach to the real difficulties faced by State highway engineers. Such an approach presumes that procedures such as the FCC's auction of spectrum capacity for PCS development is also not competitively neutral. This view of the world is appealing to a group of incumbent local exchange companies, as they stand to benefit the most from shutting down the development of competitive alternatives on the grounds that they are not sufficiently competitive. However, the Federal Communications Commission has determined that competitive neutrality does not mean "equal treatment."³ Rather, the State should not be partial to any provider or class of providers. Establishing an open and fair RFP process and granting exclusivity to the most advantageous proposal is, as is the FCC's auction of spectrum capacity, an impartial process that treats all competitors fairly.

Your letter also notes that once the State decides to allow use of the freeway by one competitor, all competitors must be treated in a competitively neutral and nondiscriminatory manner. We agree that if Section 253(c) applies, it requires such treatment. However, we disagree that the State cannot exercise management of these unique freeway rights-of-way in a manner consistent with prudent management practices. MTA concedes that it may be appropriate to manage freeway rights-of-way in a manner so as to restrict all entry. Yet, MTA apparently believes that reasonable restrictions, accompanied by contractual covenants to promote competition, are not permissible and that the State must choose either to open access to the freeway rights-of-way to all comers and expose the public to all of the attendant risks of such action, or not utilize the resource at all. This all-or-nothing approach is simply not realistic for

³ *Open Video Systems*, Third Report and Order and Second Order on Reconsideration, FCC 96-334 (rel. August 8, 1996).

developing freeway rights-of-way. Given these unique circumstances, the test of competitively neutral and nondiscriminatory treatment should look to the process by which Developer was selected and the manner in which it must treat others. Here the process was impartial and Developer's obligations assure other entities of significant opportunities to utilize the rights-of-way.

Finally, your letter objects to the State's contractual covenants imposed on Developer to charge nondiscriminatory rates. We agree that this is not a necessary part of the contract. However, the State believes that the need to limit the access to its freeway right-of-way resource required that it exercise care and judgment with regard to any potential, anticompetitive impacts, no matter how remote. Thus, the State restricted Developer to act as a wholesaler and required it to sell to telecommunications service providers on a nondiscriminatory basis, in a manner that cannot confer special benefit to any potential affiliate of Developer. It also imposed on Developer the duty to concurrently install and maintain collocated fiber owned by third parties on a nondiscriminatory basis. When a state resource is utilized to enhance competition by allowing for development of the resources, it should be done in a manner that most effectively promotes competition. This is the underpinning of Section 253(c) and the State's contract fulfills the competitive policy objectives, given the unique fact circumstances respecting freeway rights-of-way.⁴

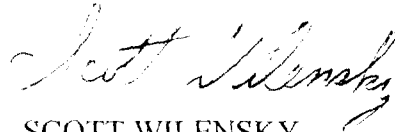
⁴ Your letter also stated that if this arrangement meets Section 253(c) objectives, then a city could grant an exclusive municipal franchise to a single LEC (or new CLECs) for exclusive use of public streets. Your reading is fundamentally flawed. First, the municipality would have to show, as the State has here, that it was not foreclosing alternative providers and alternative rights-of-way. Market opportunities within a municipality where the streets are often the only available rights-of-way to reach customer, are far more constrained than market opportunities for statewide fiber transport capacity, where multiple alternatives exist. Second, such a policy would be a change which restricts the rights-of-way already available to multiple entities. This is quite different than with freeway rights-of-way where the State is opening additional rights-of-way to development for which longitudinal utility placement had been prohibited for several decades. If the State wished to create a franchise such as the example given, it would have made all State Trunk Highway rights-of-way exclusive. Even though Section 253(a) would not be implicated by such action, the State did not do so because no legitimate state interest in protecting the safety of the traveling public was involved as is the case with unique freeway rights-of-way. The grant of exclusive access to all municipal rights-of-way would both violate Section 253(a) and be an abuse of rights-of-way management authority under Section 253(b) and (c) which MTA concedes is not the case here. In short, this case is about unique freeway rights-of-way and simple analogies to other situations are not applicable or relevant.

Richard J. Johnson
December 26, 1997
Page 6

D. Conclusion.

As I am sure your members are aware, the freeway rights-of-way in this state have not been developed for longitudinal placement of utilities. In deciding that this resource could be developed under limited conditions, the State took every step to assure that competition in the statewide telecommunications market would be enhanced by the Agreement. MTA's response appears to be that of an entrenched monopolist with existing market power. No matter how fair or how reasonable the Agreement may be in promoting the dual goals of protecting public safety and allowing for the development of competition on a competitively neutral and nondiscriminatory basis, MTA will oppose the Agreement because it will be successful in opening markets to competition. The State is disappointed, although not surprised by this result. As per your request, I will forward you a copy of the entire contract next week. When we file our Petition with the FCC, I will forward that to you as well.

Sincerely,

A handwritten signature in cursive script, reading "Scott Wilensky".

SCOTT WILENSKY
Assistant Attorney General
(612) 297-4609

COUNTY OF RAMSEY)

ADEEL LARI

4. The purpose for the prohibition was to protect the safety of the traveling public and transportation workers and minimize economic losses from utility construction and maintenance. Freeways are the safest roads having an accident rate of 0.9 compared to 2.2 for all public roads. Also, only 7% of fatalities occur on freeways while more than 25% of vehicle miles were traveled on freeways.

5. In recent years, freeway traffic control systems have become more reliant on Intelligent Transportation Systems (ITS). Many ITS technologies require deployment of fiber optics along the freeway to communicate with changeable message signs, lane direction signs, and other traffic control equipment. Fiber optic is also needed to communicate with and control T.V. cameras located on the freeways to observe and manage traffic incidents.
6. The placement of fiber optics can create safety hazards as more vehicles are required to be on the right-of-way during installation and for maintenance purposes. In addition, construction in the right-of-way can add to traffic congestion and motorists' inconvenience.
7. The more fiber running along longitudinal rights-of-way increases the probability of vehicles and work in the right-of-way which, from an engineering perspective, decreases the safety of the traveling public and transportation workers.
8. In my opinion, based upon my professional experience and consultation with other Mn/DOT engineers, given the speeds and traffic volumes experienced on freeways, the harm to public safety and convenience, of having multiple longitudinal providers of fiber optics with access to freeway rights-of-way is too significant to allow for a permit process such as are utilized for State Trunk Highway rights-of-way.

9. Mn/DOT has already deployed its own fiber along various rights-of-way and through the project will extend its fiber capacity. A close working relationship with a single firm in which monitoring of construction and maintenance activities is more easily coordinated is the most effective means of placing fiber capacity along these rights-of-way while protecting public safety and convenience.
10. In the fall of 1995 I recommended to the Commissioner of Transportation that the solicitation of a private partner be limited to a single entity. however, if that was not feasible that the public safety and convenience would be better served by not allowing for longitudinal placement of fiber optic facilities by multiple entities. This recommendation was based on consultation with other Mn/DOT engineers. In February 1996, Mn/DOT issued an RFP to solicit a private partner.
11. Developer plans to construct approximately 1,900 route miles of fiber in the State of Minnesota. Approximately 1,000 miles will be along freeway rights-of-way and the remaining 900 miles will be constructed on State Trunk Highway rights-of-way on a non-exclusive basis. A map of the proposed project is included as an Exhibit.
12. The State Trunk Highway System runs generally parallel to the project for the portion being constructed along the freeway. A map showing State Trunk Highway routes compared with freeway routes is included as an Exhibit.

13. Other alternative rights-of-way include railroad rights-of-way; natural gas pipeline rights-of-way; oil pipeline rights-of-way and power line rights-of-way. Maps of these rights-of-way are included as Exhibits. These Exhibits are taken from maps on file with Mn/DOT and have been reduced for ease of display.
14. The project will connect 17 Mn/DOT locations and 12 Department of Administration locations. It will reach northern cities such as Thief River Falls, Brainerd, and Bemidji, as well as cities such as Mankato, Marshall and Rochester in the southern part of the State. The central ring covers the Twin Cities Metro area and extends west out to Minnetonka and east out to Oakdale.

Signed


Adeel Lari

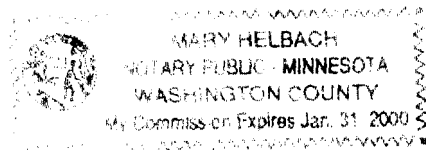
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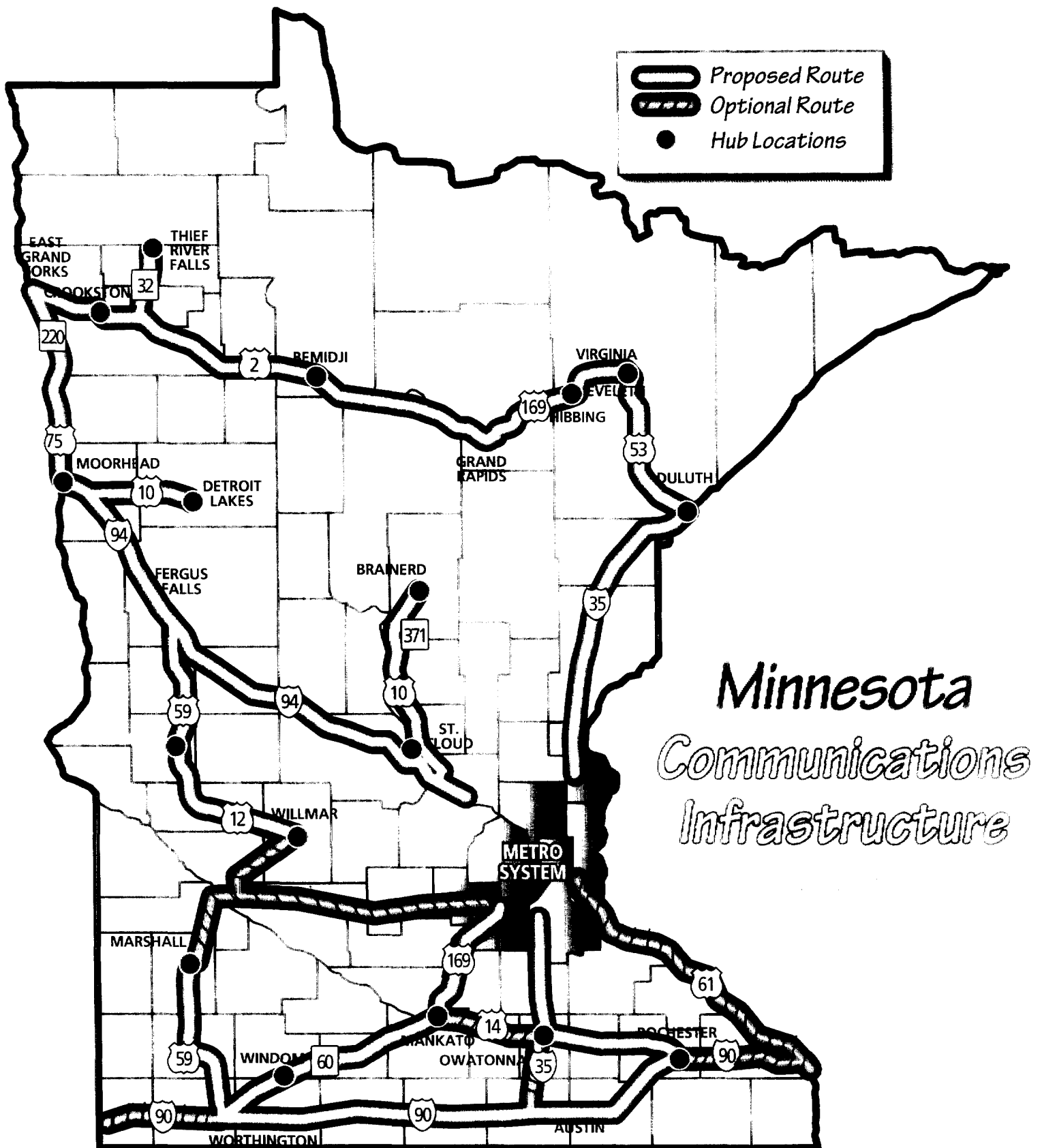
11/12/1997

Subscribed and sworn to before me on

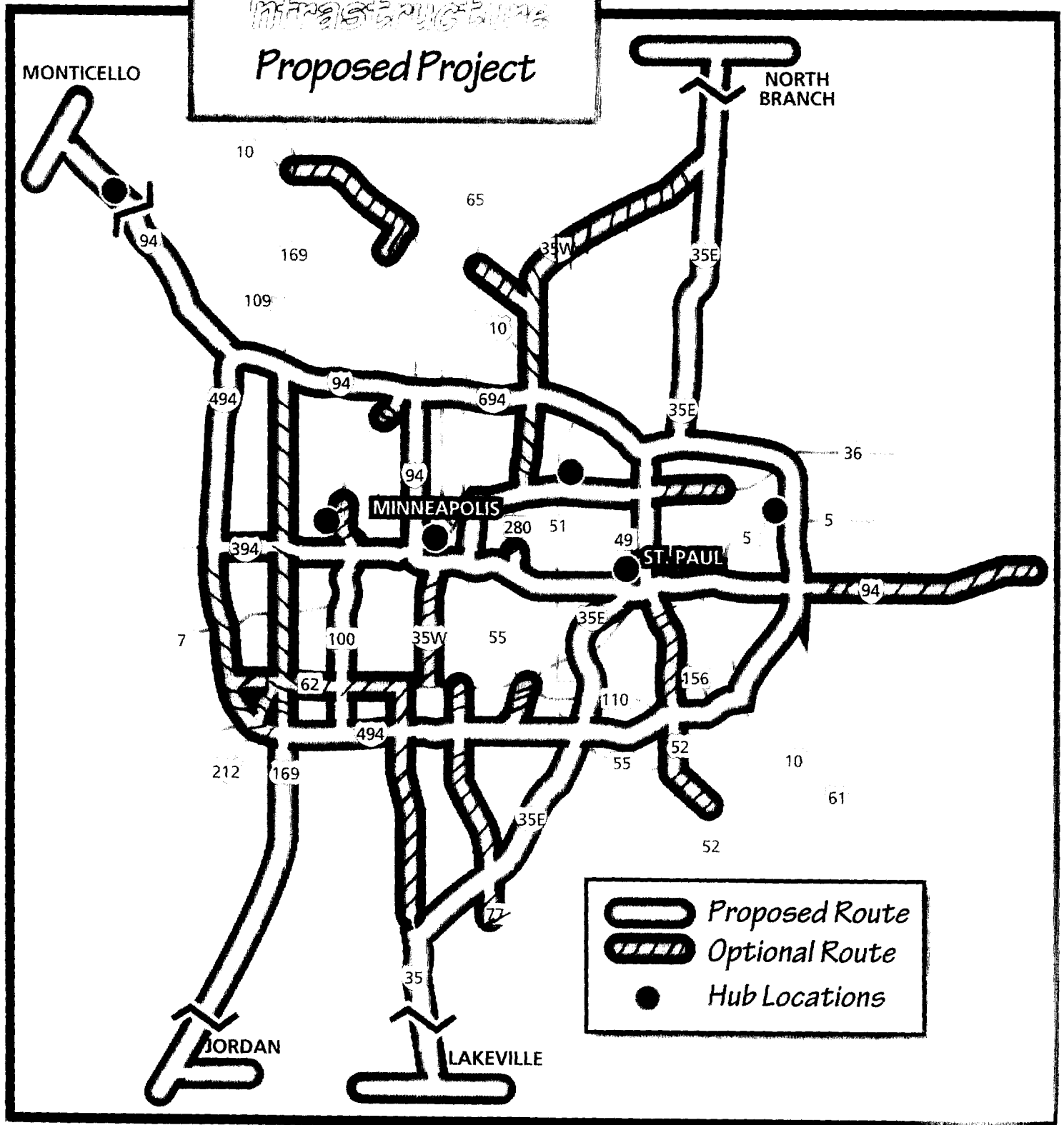
November 12, 1997


NOTARY PUBLIC





Metro Area Communications Infrastructure Proposed Project



STATE OF MINNESOTA)

) ss

COUNTY OF RAMSEY)

AFFIDAVIT OF
FAZIL BHIMANI

1. My name is Fazil Bhimani. I am employed by the State of Minnesota, Department of Administration, as a Telecommunications Consultant.
2. I have worked in the telecommunications area for the past twenty years and in Minnesota for the past eight years. As part of my duties I am responsible for evaluating the current telecommunications market so that the State of Minnesota takes advantage of rapidly changing technological needs.
3. The State of Minnesota operates MNET, which provides telecommunications services to state agencies, as well as local units of government, colleges and universities. MNET currently leases a fiber transport capacity to carry data and video transmissions from MCI. MCI leases a portion of the fiber transport capacity from the Minnesota Equal Access Network System (MEANS).
4. Under the Proposed Agreement Developer would carry the traffic currently transported by MCI in conjunction with MEANS.
5. Based on my knowledge of the telecommunications market in Minnesota, several interexchange companies, including MCI, AT&T, Sprint, Wiltel, and U.S. Link, have deployed fiber optic network facilities within the State of Minnesota.
6. In addition to these interexchange companies, local telephone companies have also deployed fiber optic networks. U S WEST, the Regional Bell Operating Company

serving Minnesota has fiber transport facilities throughout the State but cannot yet carry traffic across LATA boundaries. GTE and United Telephones have fiber transport facilities and provide local service in a significant number of communities. MFS has a fiber ring in the metropolitan area as does MCImetro.

7. Approximately 65 small independent LECs are shareholders in MEANS, which has deployed a fully fiber network consisting of approximately 1,700 miles of fiber. US West and other Local Exchange Carriers along with InterExchange Carriers provide a fiber based analog video network throughout the State of Minnesota for K-12 and higher educational facilities.
8. A map of fiber facilities of telecommunications companies in Minnesota compiled by the Minnesota Department of Public Service, the state agency responsible for enforcing certain state regulatory requirements for telecommunications companies is included as an Exhibit.
9. Other companies are planning to install new facilities in Minnesota. I am aware that Cooperative Power Association (a generation and transmission cooperative); and Brooks Fiber are planning on installing new fiber facilities to carry interexchange traffic.
10. Technological improvements in electronics has changed the manner in which fiber capacity can be increased. A few years ago the capacity of a single fiber strand was limited by the capacity of the electronics deployed. Since 1992, improvements in electronics have increased the carrying capacity of a pair of fiber strand by as much as a factor of 40 (OC 48 to multiple OC 192s). This improvement in electronics is likely to continue over the next several years.
11. An entity wishing to expand its current fiber capacity would likely do so today by upgrading the electronic equipment on its network rather than trenching and installing

additional underground fiber facilities. An upgrade from an OC-48 (vintage 1992) to multiple OC 192s (vintage 1997) is the equivalent of placing 96 additional fiber strands in the ground.

12. The current cost for changing out an OC-48 to multiple OC 192 is generally more economical than installing additional fiber strands. Existing fiber providers should be able to then increase network capacity significantly at a cost which is significantly lower than adding new fiber.
13. Fiber is also being installed for local exchange traffic. MFS and MCI Metro has deployed fiber facilities. Brooks Fiber and OCI Telecommunications are currently installing or planning to install facilities in the Minneapolis/St. Paul area.
14. It is my understanding that in a meeting with the Commissioner of Administration, representatives from the MTA and AT&T they informed the Commissioner of Administration that there was plenty of bandwidth in the State of Minnesota. Bandwidth represents the available capacity of fiber that has been lit. This capacity has mentioned above can be increased significantly by upgrading existing electronics.

Signed Fazil Bhimani

Date 11/3/97

Fazil Bhimani

Subscribed and sworn to before me on

Craig Schmidt
NOTARY PUBLIC